United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7012

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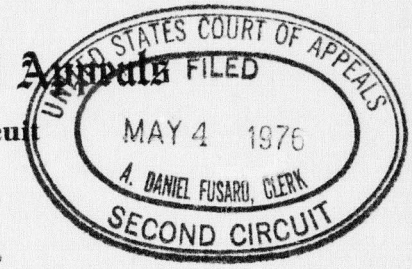

RIDEL C. REVILLA,

Plaintiff-Appellant,

against

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant and Third-Party Plaintiff-Appellee,

against

PITTSTON STEVEDORING CORP., and HOFFMAN RIGGING AND CRANE CO.,

Third-Party Defendants-Appellees.

ANSWERING BRIEF OF DEFENDANT-APPELLEE

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Statement of the Issues

1. Was the Trial Court not correct in removing from the consideration of the jury any claim predicated upon weather conditions when for the first time, and in contradiction of his earlier testimony on examination before trial, plaintiff stated in his answer to a single question that one of the causes of his falling off the container was the presence of ice and water, there having been no further evidence as to any causal relationship between this ice and water and plaintiff's fall?

2. There having been no mention made of the defendant's affirmative defense of plaintiff's contributory negli-

gence in the opening statements of counsel, and the Trial Court having instructed the jury following the withdrawal of that affirmative defense by defendant at the close of all the testimony that the defendant was not claiming any contributory negligence on plaintiff's part, did the Trial Court in its charge to the jury reinstate that affirmative defense by stating that if the jury found that the negligence of others, including plaintiff, was the *sole* and *only* proximate cause of the accident, then plaintiff could not recover against the defendant-shipowner on his negligence claim?

3. Where the issues raised by the defendant's third-party complaint against both third-party defendants were not before the jury for its consideration, and where the Trial Court repeatedly instructed the jury on the shipowner's non-delegable duty to provide plaintiff with a safe place to work, and a seaworthy vessel, was the Court not correct in instructing the jury to disregard the statement by plaintiff's counsel during summation that defendant was "a conduit through which a plaintiff must go to get to where the just burden lies in this case" (189 A).

Statement of the Case

This appeal involves an action brought by plaintiff, Ridel C. Revilla, to recover damages for injuries sustained by him on February 19, 1969, while he was working as a longshoreman in the employ of Pittston Stevedoring Corp., aboard *c/v Sea Witch,* a vessel owned by defendant. In turn, the defendant served a third-party complaint naming Pittston Stevedoring Corporation, plaintiff's employer, as a third-party defendant seeking indemnity. At a later date, and after plaintiff had testified on examination before trial, defendant served a third-party complaint naming Hoffman Rigging and Crane Co., as an additional third-party defendant.

On the trial of the action only the issues as between plaintiff and defendant were submitted to the jury.

In answer to three special interrogatories prepared by the Trial Court the jury stated that the defendant had not been negligent, that the vessel and her equipment had not been unseaworthy, and that there was no proof of a continued course of negligent conduct of persons engaged in the discharge of the cargo such as to create an unseaworthy condition. On the basis of the jury's answer to those three special interrogatories, the Court entered judgment against plaintiff and in favor of defendant.

C/v Sea Witch, a container-type vessel with no cargo loading or discharging gear of her own, was in Port Newark, New Jersey, on February 19, 1969. Cargo containers, which were stowed two-high on the top open deck of the vessel were being discharged by longshoremen, including plaintiff, employed by Pittston Stevedoring Corporation and assisted by a shore crane owned by Hoffman Rigging Crane Co., which was doing the actual lifting of the containers from their places of stow on the vessel. At the time of the accident plaintiff had been working with another longshoreman on top of the two-high containers, it having been their jobs to see to it that the crane's lifting bridle was properly locked onto the top of each container before it was lifted by the shore crane. It was plaintiff's claim that he fell from the top of one of these containers and sustained personal injuries.

In plaintiff's complaint, which was filed on June 18, 1970, it was alleged that plaintiff was "precipitated from a container" because of the negligence of the defendant and the unseaworthy condition of his vessel (7 A).

When plaintiff testified on an oral examination before trial in September 1972 he stated that he had been knocked

off the top of the container by the bridle, which had moved suddenly and unexpectedly in an upward direction before plaintiff and his co-worker had had an opportunity to lock it into place on top of the container (137 A). On that same examination before trial plaintiff was asked (138 A):

> "Was there any other cause or any other reason why you fell off the top of the container?"

and he gave the following answer:

> "No, sir, I saw nothing else."

In the affidavit of plaintiff's counsel, dated May 1975 in support of a motion (later denied by the District Court (252 A)) to amend the original complaint so as to assert a direct action against Hoffman Rigging and Crane Co., as a co-defendant the circumstances of the accident were described as follows:

> "When the spreader [bridle] was lifted instead of coming with the container it came loose, or was not locked in place, and thereby caused the spreader to swing out of control and strike the person of the plaintiff, to precipitate him to the deck below, a distance of approximately 16 feet." (11 A)

In the opening statement by plaintiff's attorney the accident was described in the following terms:

> "In any event, the bridle without being locked in suddenly lifted, swung toward the plaintiff while he was standing on an adjoining container, struck him in his abdomen and various other parts of his body, I assume, and he fell down feet first 16 feet to the deck below." (26 A)

Plaintiff's testimony as to the occurrence of the accident on direct examination was short and to the point:

> "Q. Had you yet gone to the container that was to be discharged when your accident happened? A. I was on top of the container which was not going to be discharged.
>
> Q. And then what happened? A. The bridle moved and I felt it striking me in my stomach and I fell down." (132 A)

This testimony by plaintiff was repeated a minute later on cross-examination when plaintiff was asked the following question and gave the following answer:

> "Q. And when that bridle hit you in the stomach it knocked you right over the edge, didn't it? A. Yes." (133 A)

A few minutes later, while plaintiff was still under cross-examination, the following question was asked:

> "Q. Now, Mr. Revilla, was there anything else that caused you to fall over the side of that container down to the deck besides being hit in the stomach by the bridle? A. There was ice and water, quite a bit." (135-136 A)

This last answer of plaintiff was in total contradiction of what he had testified to on his examination before trial (using the same interpreter who interpreted on the trial) in September 1972. There was no re-direct examination of plaintiff by his attorney on any alleged causal relationship between ice and water on top of the container and plaintiff's fall from the top of that container. This was the first and only time that any claim had been made by or on behalf of plaintiff that anything other than having been hit in the stomach by the bridle had caused him to be precipitated from the top of the container.

Neither of plaintiff's two co-workers who testified on the trial saw the actual events at the moment plaintiff was stuck and fell. The signalman, Canales, who had been giving signals to the crane operator located on the pier was not in a position where he could see what was going on on top of the container 16 feet above the deck (59 A). Plaintiff's co-worker on top of the container, Martinez, testified that he did not know what had caused plaintiff to fall (81-82 A).

Plaintiff's brief makes much of the testimony of Mr. Zeltmann, who was plaintiff's meteorological expert. In fact, Mr. Zeltmann testified that the temperatures at the Newark Airport, a mile and a half away from where the ship was berthed in Port Newark, ranged between 34 and 35 degrees during the afternoon of February 19, 1969. At no time that afternoon was the temperature at or below the freezing point (102-105 A). The only sub-freezing temperatures (a low of 31 degrees) had been between 4 A.M. and 7 A.M., at least nine hours before the accident occurred (101, 106 A). Furthermore, Mr. Zeltmann admitted on cross-examination that according to the Newark Airport Weather Bureau Office report the *total* accumulation of snow and sleet for the 24-hours of February 19, 1969, had been "a trace", which he said was equivalent to a depth of less than a tenth of an inch (114-115 A).

Mr. Zeltmann's testimony could not establish any relationship between the weather conditions existing in the Newark Airport and the fact that plaintiff fell from the top of the container aboard *c/v Sea Witch.*

Against this background defendant's motion for a directed verdict made after plaintiff rested (153-160 A) was partially granted by the Court on the following morning (163 A), when the Court dismissed any claims predicated upon weather conditions stating that no proof of proximate cause had been established.

The claim was also made on behalf of plaintiff that the ship was unseaworthy because of the absence of guard rails or safety lines around the top of the containers being discharged and that the vessel was similarly unseaworthy because the lines which were used to lock the bridle onto the container were not long enough so that they could be operated from the deck 16 feet below thereby eliminating the necessity for the men being on top of the containers. These issues were given to the jury, and the jury answered one of the three special interrogatories by stating that the ship and/or her equipment were not unseaworthy.

On the issue of guard rails or safety lines, plaintiff's witness Angel Canales, who had worked as a longshoreman for 18 years, admitted on cross-examination that he had never seen safety nets rigged around containers when the containers were only two-high (65-66 A). Furthermore, when plaintiff was asked on direct examination by his own attorney about his experience with tag lines on the corners of a bridle, he responded that such tag lines were only used on occasions when the containers were one-high, and that when the containers were two-high the men would go up on top of the containers in order to secure the bridle (131 A). No stevedoring or maritime expert was called by plaintiff's attorney in support of the claims relating to safety lines and tag lines. The jury considered the testimony on the subject such as it was and answered the unseaworthiness questions in the negative.

The defendant rested at the close of plaintiff's case without offering any proof or testimony. No witnesses were called by either of two third-party defendants.

Against this background defendant's counsel argued to the jury in summation that the only evidence as to the cause of the accident was that the operator of the shore crane had lifted the bridle unexpectedly and before it was

locked into position, and that the bridle had struck plaintiff in the stomach knocking him off the container. Simply stated, it was our argument that plaintiff should have sued Hoffman Rigging and Crane Co., since plaintiff and his two witnesses had all testified that no signal to lift the bridle had been given either to the longshoreman-signalman or to the crane operator before the accident occurred.

On the testimony of plaintiff and his witnesses alone the case was submitted to the jury to decide whether the defendant had been negligent in causing plaintiff's fall, whether the ship had been unseaworthy by reason of the nature and condition of her equipment, and whether the ship had been unseaworthy because of any continued course of negligent conduct by those engaged in the discharge of the containers, that is, the employees of Pittston Stevedoring Corporation and/or Hoffman Rigging and Crane Co. The jury answered all the three questions in the negative, and judgment was entered for defendant.

POINT I

The Court did not commit reversable error in removing from the consideration of the jury any claim predicated upon weather conditions.

After plaintiff had rested his case defendant moved for a directed verdict and for a dismissal of plaintiff's complaint on the grounds that plaintiff had failed to establish a *prima facie* case either on his negligence or on his unseaworthiness counts. This motion by the defendant was far from perfunctory, and was based upon the contention that the plaintiff's proof compelled the conclusion that the cause of the accident was the sudden and unexpected lifting of the container bridle by the operator of the shore crane owned by Hoffman Rigging and Crane Co. (154 A).

This motion was granted by the Trial Court, but only to the extent that the Court dismissed plaintiff's claims predicated upon weather conditions (including the alleged snow, ice and rain) since, as the Court put it, no proof of proximate cause as to these elements had been established.

We shall not review the record of plaintiff's claims as to proximate cause as set forth in some detail in our Statement of The Case earlier in this brief. Suffice it to say at this time that plaintiff's single answer to a single question in which he stated that there was ice and water on the top of the container from which he was precipitated, directly contradicted what he had stated three years earlier on his oral examination before trial (138 A). At no time, either on direct or on cross-examination, did plaintiff testify that he had slipped on the ice or water or that the ice or water had caused him in any way to lose his balance, and nowhere in this record is there any basis for connecting the alleged ice and water on top of the container with plaintiff's fall. To the contrary, plaintiff's testimony points to his having been suddenly and unexpectedly struck in the stomach by the rising bridle which caused him to be knocked over the edge of the container to the deck below.

We submit that there was no issue of fact as to a causal relationship between the fall and the ice and water to be submitted to the jury. Nor do the authorities cited in plaintiff's brief lend any support to his arguments.

Contrary to what is stated in plaintiff's brief, this Court's decision in *Anderson* v. *Great Lakes Dredge & Dock Co.*, 509 F.2d 119 (2 C.A. 1974), did not hold that a conflict between plaintiff's testimony on trial and his earlier testimony on examination before trial should be remanded for jury resolution. Anderson's contentions were two-fold: First, that his accident was brought about by the defendant's failure to furnish him with sufficient help to operate

the winch, and second, by a "fish-hook" or broken strand of wire on the moving cable which caught his glove and pulled him into the winch. It so stated in this Court's summary of the facts at page 1120 of 509 F.2d. The separability of these two claims is re-emphasized on page 1122 where Judge Mansfield noted that plaintiff's claims as to undermanning were uncertain, so his alternative claim of a defective cable "assumed considerable importance". Comments by this Court about issues to be resolved by the jury related to the claim of an inadequate or insufficient crew and not to the claim of the defective cable. At page 1130 Judge Mansfield noted that it was the contention of the defendant that there was no proof that any inadequacy of the crew was the proximate cause of plaintiff's accident. Judge Mansfield wrote:

> "We disagree. * * * Although there was contrary evidence, the issue was clearly one for the jury to resolve."

If we back-track to page 1122 of the *Anderson* opinion we find that the contradictions between plaintiff's testimony on examination before trial and his testimony of the trial itself were on the subject of the alleged "fish-hooks" in the cable. We do not find that this Court believed that this issue should have been resolved by the jury. Rather, this Court commented upon defense counsel's motion to strike plaintiff's testimony given on direct examination in contradiction of his earlier testimony on examination before trial, stating at page 1122:

> "At this point in the trial the court, instead of granting the motion and instructing the jury to disregard the earlier testimony, again took over the questioning of the plaintiff and elicited, and in the presence of the jury, testimony to the effect that while plaintiff neither felt nor saw any 'fish-hook', he 'deduced' that it must have been a 'fish-hook' ".

We read the foregoing as an indication that defendant's motion to strike should have been granted by the Trial Court, which is a far cry from saying that it was this Court's ruling that the issue should have been left for the jury.

While on the subject of the *Anderson* decision we respectfully reject the suggestion that there is any comparison between the way the Trial Court treated defense counsel in *Anderson* and the way plaintiff's counsel fared at the hands of the Trial Court in the instant matter. True, there were a number of rulings by the Trial Court in the instant case which went against plaintiff, but such a record can hardly be equated with a claim that "the Trial Judge opening and obviously to the jury favored defendant's case * * * ", as stated in plaintiff's brief.

Nor do we find any support for plaintiff's claims as to the contradictory testimony in the cited case of *Imbriale* v. *Skidmore,* 252 App. Div. 884, 300 N.Y.S. 4. There the Appellate Division held that the precise locus of the accident was not the exclusively determinative element on the issue of whether or not defendant had been negligent in the operation of the car when it struck and injured plaintiff. The Court below had charged the jury that plaintiff could not recover against defendant if the accident "did not happen while the plaintiff was on the sidewalk". It appears that two or more witnesses had given contradictory versions as to whether or not plaintiff was on the sidewalk when the accident occurred. The Court held that it was not necessary that one of the two contradictory versions be accepted to the exclusion of the other, noting that plaintiff's "testimony did not profess to fix the precise point [where he was then struck]". We submit that this is entirely different from the situation which we now have before us, for the only testimony as to why plaintiff was

precipitated from the top of the container came from plaintiff himself, first on his oral examination before trial, and later during the trial itself. Plaintiff flatly contradicted himself when he testified on trial, and his statement that there was ice and water on top of the container and that this was a cause of accident injected this element into the case for the very first time, some seven years after the occurrence of the accident itself.

Furthermore, plaintiff had not testified on direct examination that snow, ice or water had anything to do with his fall. Nor did plaintiff so testify on redirect examination, though one would have guessed that his counsel would have seized this opportunity to elicit from plaintiff that he had slipped on the ice or water, and that had it not been for this ice and water the blow from the bridle would not have knocked him over the side.

Perhaps the case of *Pisano* v. *Yamashita Shinnihon Kisen, et al.,* 1974 A.M.C. 1755, not officially reported, cited by plaintiff on page 16 of his brief points up clearly just what testimony is missing in our record. Plaintiff cites this decision by then District Judge Gurfein for the proposition that an "icy deck" rendered the vessel unseaworthy. But in that case Judge Gurfein found specifically that plaintiff had slipped and fallen on ice (Finding of Fact 4), and that the ice was the proximate cause of plaintiff's injuries (Finding of Fact 5). We have no evidence whatsoever in this case that plaintiff slipped on any ice or water, or that his fall was brought about by anything other than the sudden and unexpected blow by the rising bridle, which literally knocked plaintiff over the edge of the container.

We submit that, if anything, the striking of plaintiff's claim about ice and water worked to plaintiff's benefit for it prevented defendant's counsel from capitalizing in his

summation on plaintiff's desperate efforts to avoid acknowledging his earlier testimony on examination before trial on the subject of snow, or the lack of it, on top of the container that afternoon (138-144 A). There are some things which neither a trial record nor a joint appendix can reflect. Plaintiff's attempts to explain away his earlier answers on examination before trial claiming that he had believed that in September 1972 defendant's counsel had been asking him about conditions on top of the container on a vessel *other than c/v Sea Witch* resulted in laughter from the jurors, which may still be ringing in the ears of those who heard it, but finds no place in the record before this Court. In answer to the final question on this phase of the cross-examination plaintiff conceded that he did not recall having been asked any questions in September 1972 having to do with a ship he may have been working on two days before the accident (144 A).

When the issue of ice and water was removed from the case on the next morning by the Trial Court's partial granting of the motion for a directed verdict, defense counsel lost a large share of material for summation, for the jury's obvious reaction to plantiff's verbal writhings was a fertile field for attacking plaintiff's credibility and arguing to the jury about plaintiff's efforts to go back on his former sworn testimony in an effort to bolster his case.

One final word on the subject of the examination before trial. In his brief plaintiff emphasizes the fact that the transcript of the examination before trial had not been signed by him, that he had not read through the transcript of the September 1972 testimony before testifying on the trial, and that he had not asked his attorney for an opportunity to read the testimony before the trial. We fail to see the relevancy of these protestations, for, if anything, they reflect an extraordinary lack of basic trial preparation, and plaintiff's failures in these respects cannot be con-

strued as inuring to his benefit. There is a difference between claiming that one did not remember having testified in a certain manner three years earlier and claiming that the earlier testimony was incorrect or inaccurate.

POINT II

There was no error in the Trial Court's charge bearing upon plaintiff's assumption of normal risks.

The following is in answer to plaintiff's Point Two in which it is claimed that the Trial Court was in error in charging "the discredited common-law principle of assumption of risk" (plaintiff's brief page 17).

Reference to the specific words of the charge will establish that the Trial Court did not reinstate the defense of contributory negligence abandoned by defendant and did not charge the jury that plaintiff assumed the risks of defendant's negligence or the unseaworthiness of its vessel. The Comments by the Trial Court about plaintiff's assumption of normal risks was safely within the scope of comments permitted by this and other Courts.

As set out in paragraph 2 of the Statement of The Issues at the beginning of this Brief no mention was made by either counsel about defendant's affirmative defense of plaintiff's contributory negligence in the opening statements to the jury. At the close of all the evidence, defendant withdrew its affirmative defense of contributory negligence (170 A), and the Trial Court so instructed the jury (175 A).

Against this background plaintiff complains that the following language from the charge reinstated this abandoned defense:

> "If you should find from a preponderance of the credible evidence that negligence on the part of the

> stevedoring company, or its employees, including the plaintiff, was *the sole*, that is, *the only*, proximate cause of the accident, then the plaintiff cannot recover from the defendant shipowner on his negligence claim". (207-208 A) (emphasis added)

We submit that this portion of the charge was harmless.

It is axiomatic that if there is no liability on the part of the defendant-shipowner then the possible contributory negligence of the plaintiff is a moot question. Contributory negligence in the maritime law goes to the diminution of damages, and if there were no damages there was nothing to diminish. "If the sole, that is, the only, proximate cause of the accident" was the negligence of someone other than the defendant, then there would have to be a defendant's verdict on the negligence count and as stated by the Court contributory negligence would be a dead issue. The Trial Court's comment was no more than a statement that in the absence of proximate negligence on the part of the defendant, that defendant could not be found liable to plaintiff on the negligence count. It was not a charge relating to or reinstating the defense of plaintiff's *contributory* negligence.

Additional accusations are made by plaintiff to the effect that the Trial Court charged the jury on the discredited defense of assumption of risk. Again, a reading of the language of the charge indicates that this is not so, and that the language used by the Court has been endorsed as acceptable, since it spoke of normal hazards of the calling and did not refer to assumptions on the part of plaintiff either of the defendant's negligence or of the unseaworthiness of its vessel.

At 207 A the Trial Court charged the jury that

> "If a longshoreman is injured in one of the normal hazards of his calling without fault of anyone else, and if the ship is seaworthy, he must bear the loss himself."

On the same page the Court carefully instructed the jury that "a longshoreman does not assume the risk arising in whole or in part from the negligence of a shipowner".

In the same vein, the Court charged the jury (207 A):

> "Although a longshoreman never assumes the risk of injury from any negligence of the shipowner or any other person, it is a fact of common knowledge that in almost every occupation aboard ships there is some inherent and unavoidable risk which does not arise out of either negligence or unseaworthiness; and a longshoreman, when he enters upon his calling, must assume all inherent and unavoidable risks of his occupation."

These sentences explain what the Court had in mind in that portion of the charge which has been characterized by plaintiff's counsel as an old-fashioned charge of assumption of risk. All the Court was doing was pointing out to the jury that longshore work aboard ships involves "normal hazards" which though not perhaps acceptable in the home, are nevertheless fully to be anticipated and coped with aboard ship.

The Trial Court took pains to point out that "assumption of risk" was not a defense to a negligent defendant or an unseaworthy vessel stating at (210 A):

> "On the other hand, the longshoreman does not assume the risk of injury arising in whole or in part from a shipowner's breach of duty to provide a sea-

> worthy vessel. It is so even when the longshoreman works under conditions of obvious danger, if the longshoreman's injury, I say, is proximately caused by the ship's failure to provide him with a reasonably safe place to work and reasonably safe conditions."

We respectfully submit that the Trial Court was careful to distinguish between the assumption of customary hazards and the assumption of the defendant's negligence or unseaworthiness.

Mr. Justice Frankfurter's concurring opinion in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S.Ct. 444 (1943), is in point. Mr. Justice Frankfurter noted the distinctions between the two types of assumptions in the following terms at 318 U.S. 72:

> " 'Assumption of risk' as a defense where there is negligence has been written out of the Act. But 'assumption of risk', in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded. But until Congress chooses to abandon the concept of negligence, upon which the Act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the principle expressed, in one of its senses, by the phrase 'assumption of risk', namely, that a carrier is not liable unless it was negligent."

The *Tiller* case was swiftly followed by *Roberts* v. *United Fisheries Vessels Co.*, 141 F.2d 288, (1C.A. 1944),

Cert. Den. 323 U.S. 753, 65 S.Ct. 81. The Court of Appeals endorsed the charge of the District Court on assumption of risk as set out at 141 F.2d 292, stating that seamen still assumed the normal risks of the calling, provided only that the defendant was free of fault. In support of the lower court's charge the Court of Appeals quoted from Mr. Justice Frankfurter's concurring opinion in the *Tiller* case quoted above in this Brief.

In due course this Court passed upon the same point in *Lake* v. *Standard Fruit & Steamship Co.*, 185 F.2d 354 (2 C.A. 1950). This Court quoted the following language from the *Roberts* decision at 185 F. 2d 356:

> "But where the injury or death is not the result, in whole or in part of the negligence of the employer, or his agents, the provision has no effect to change the rights or remedies of the parties and in the case of a seaman, he takes the same risks of his calling as he did before under admiralty law. By the Jones Act he is given a right of action for the negligence of his employer which he did not have before, but the usual risks of the calling are not shifted on to the employer if the employer is guiltless of any fault."

Even more recently, the same point was raised before this Court in *Rush* v. *Cargo Ships & Tankers, Inc.*, 360 F.2d 766 (2 C.A. 1966). On the subject of assumption of risk and its place in a personal injury charge to the jury, this Court held at 360 F.2d 769:

> "It is correct that a seaman 'assumes the risk' of his calling, even though 'assumption of risk', a quite different matter, see Tiller v. Atlantic Coast Line, 318 U.S. 54, 68-69, 63 S.Ct. 444, 87 L.Ed. 610 (1943) (concurring opinion), is no defense in a Jones Act suit, Socony-Vacuum Oil Co. v. Smith, 305 U.S.

> 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939). But it is not error to refuse the charge requested here. That an employee 'accepts' or 'assumes' the 'ordinary' or 'various and well-known' risks of his calling means that an employee injured as a result of being exposed to a risk not avoidable by the employer's *due care,* cannot recover for negligence. This being true, and since negligence and due care were comprehensively treated in the charge, appellant's requested charge was unnecessary." (Emphasis by the Court)

Finally, we have the decision of the Ninth Circuit in *Temblador* v. *Hamburg-American Lines,* 368 F.2d 365 (9 C.A. 1966). In this case, unlike the ones just referred to, plaintiff was a longshoreman rather than a seaman, and, if anything, his rights under the maritime law would have been somewhat less than those of seamen, who are still considered to be "wards of the Court". In that case the charge of the Trial Court read in part as follows (368 F.2d 368):

> "As you have been instructed, a longshoreman does not assume the risk of injury from negligence of another, or unseaworthiness of the vessel or its appliances. However, in nearly every occupation there is some *inherent* and *unavoidable risk* which does not arise out of unseaworthiness. A longshoreman must assume these risks when he enters upon his calling and he may not recover for injuries resulting solely therefrom." (Emphasis by the Court)

In commenting upon the objections of appellant's counsel to this portion of the charge, the Court wrote at page 368:

> "He specifies it as error because, he argues, it is inapplicable to the present case. He is correct in

> saying that a longshoreman does not assume the risk of unseaworthiness. *Manich* v. *Southern S.S. Co.*, supra. The instruction, however, does not charge that there was any such assumption. It deals only with a risk 'which does not arise out of unseaworthiness.' The instruction clearly stated, 'a longshoreman does not assume the risk of injury from negligence of another, or unseaworthiness of the vessel or its appliances.' "

We respectfully submit that the Trial Court's charge about assumption of risk conformed closely, if not exactly, to the language permitted and endorsed by this Court and by the First and Ninth Circuits cited above. At no time was this jury instructed that plaintiff assumed the risk of the defendant's negligence or that he assumed the risk that the *c/v Sea Witch* might have been unseaworthy.

POINT III

The jury was properly charged by the Court on the defendant's non-delegable obligation to provide plaintiff with a safe place to work and a seaworthy vessel.

In special interrogatories 1 and 3 (258-259 A) the jury was asked to determine whether the defendant had been negligent in any respect in permitting the containers to be discharged in a hazardous manner and if the vessel had been unseaworthy because of the defendant's failure to provide proper equipment reasonably fit for the purpose of discharging the containers. The jury answered both of these special interrogatories in the negative.

The jury was charged repeatedly about the defendant-shipowner's non-delegable duty to provide plaintiff with a safe place to work (a negligence concept) and a seaworthy

vessel. The Trial Court charged the jury that the defendant could be liable for negligence if it knew or should have known that the stevedore's method of discharging did not conform to standards of reasonable care (203 A). At page 204 A the jury was told that the defendant was under an obligation to use ordinary care to furnish plaintiff with reasonably safe equipment and a reasonably safe place in which to work aboard the vessel as well as to maintain plaintiff's place of work in a "reasonably safe condition". Furthermore, the Trial Court charged the jury that these obligations of the defendant to plaintiff existed independently of any obligation owed to plaintiff by others (such as his stevedoring employer) and that the defendant's obligation could not be transferred or shifted to anyone else (204 A). A minute later the jury was again charged that "the defendant-shipowner has a non-delegable duty to furnish the plaintiff with a safe place in which to work on the vessel" (206 A).

At (209 A) the Trial Court gave the jury a standard-form charge about the defendant's non-delegable duty to provide a seaworthy vessel.

Not content with the foregoing, the Trial Court re-emphasified the non-delegable nature of the defendant's obligation charging the jury that:

> "Although the shipowner has no duty to oversee, supervise or direct the methods by which a stevedoring company and its employees perform their work, relinquishment of control over the vessel to an independent contractor—I will say the stevedoring company—does not relieve the owner of his obligation to provide a seaworthy vessel, liability for which continues even after control of the ship may have been surrendered to the stevedore.

> Regardless of who may be in actual possession, operation or control of a vessel or any part thereof, liability for an unseaworthy condition remains on the shipowner.'' (211 A)

As though all this were not enough, the jury was instructed again about the defendant's continuing duties to furnish plaintiff with reasonably safe equipment and a reasonably safe place in which to work in a supplementary charge (231-232 A).

Against this background plaintiff complains that his counsel was not allowed to argue that defendant was ''a conduit through which a plaintiff must go to get to where the just burden lies in this case'' (189 A). We respectfully submit that the ruling by the Trial Court on this point was eminently correct.

The extent of the liability, obligations and duties of the defendant-shipowner to plaintiff were not the greater and could not be expanded beyond the bounds of the law simply because the two third-party defendants (plaintiff's stevedore-employer and the shore crane company) were in the courtroom. As noted earlier in this brief, the only liability issues before this jury were those as between plaintiff and defendant. The jury had nothing whatsoever to do with the third-party complaints served by defendant on the two third-party defendants. Furthermore, and unlike the majority of such three-cornered or four-cornered maritime personal injury cases, there were no opening statements by either third-party defendant, no questions were asked of any witnesses by either counsel for third-party defendants, and not one word of summation from either counsel for third-party defendants. The extent of their participation was limited to a few isolated objections to certain questions or certain answers of the witnesses.

We respectfully submit that the statement by plaintiff's counsel in his summation about defendant's role as a "conduit" to the culpable party or parties was designed to ask the jury to look beyond the defendant, and render a verdict for plaintiff, not upon the basis of the obligations owed by defendant according to the charge, but upon some independent failure or failures on the part of the third-party defendants. The defendant-shipowner in this case (all the more so because of the silent role played by the third-party defendants) had a right to have its liability determined by the jury just as though the two third-party defendants did not exist.

Finally, some comment should be made about the authorities cited in Point Three of plaintiff's brief. Judge Learned Hand's decision in *Zinnel* v. *United States Shipping Board Emergency Fleet Corp.*, 10 F.2d 47 (2 C.A. 1925), hardly provides a parallel to the standard of care required to discharge two-high containers from the deck of *c/v Sea Witch,* for plaintiff in that case was a seaman who was attempting to lash loose deck cargo aboard a vessel at sea during heavy weather. The seas were so large that green water was coming over the deck cargo, and one of the waves swept Zinnel overboard. It is not surprising that Judge Hand wrote that there was an issue for the jury as to whether the deceased had been provided with a safe place in which to work. Furthermore, we might point out that the issue of guard rails or safety nets on the top of the containers of *c/v Sea Witch* was presented to the jury, and the jury by its answers to the special interrogatories indicated that in its view plaintiff had had a reasonably safe place in which to work despite the absence of these additional protections.

Plaintiff did not submit any expert testimony, and when the jury asked for further instructions as to "what con-

stitutes proper equipment for discharging cargo under the circumstances described during the trial'' (238-239 A), the Court instructed the jury that they would have to draw that information from the testimony, and this was not a matter as to which they could be instructed by the Court (239 A). Such a procedure is squarely in line with Judge Augustus Hand's opinion in *Kennair* v. *Mississippi Shipping Co., Inc.,* 197 F.2d 605 (2 C.A. 1952), cited on page 20 of plaintiff's brief. Clearly, the jury, composed as it was of ordinary men and women and not of maritime experts, had to rely upon the proof in the case in order to determine whether the obligations of defendant to plaintiff had been met.

One final word about the last authority cited in plaintiff's brief.

We have read and re-read the decision of the United States Court of Appeals for the First Circuit in *Martinez* v. *Compagnie Generale Transatlantique, et al.,* 517 F.2d 371 (1 C.A. 1975), cited on page 21 of plaintiff's brief, but we fail to see how it stands for the proposition stated. Since the unseaworthiness of the vessel in that case related to defective functioning of the ship's own winch during cargo operations, it is not surprising that we find nothing stating that the shipowner can be liable irrespective of whose duty it had been to furnish necessary equipment for a safe cargo operations.

We respectfully submit that this jury was properly charged about the extent of the defendant's responsibility for furnishing proper equipment for the discharge of the containers whether that equipment was to be provided initially by the ship or by the stevedore. The Court's initial comment (201 A) about being unable to state the details of plaintiff's contention that the vessel was unseaworthy because of the defendant's failure to furnish proper equipment

for discharging was of no consequence when viewed against the succeeding portions of the charge, and was obliterated by a short supplementary charge just before the jury retired (232 A) in which the Trial Court referred to the earlier comment and reminded the jury about one or more of the specific claims made in this respect and closed by stating:

> "If there is anything else which was mentioned by the witnesses in the proof, that's up to you to determine".

Again, *Kennair v. Mississippi Shopping Co. Inc., supra,* appears to be in point.

CONCLUSION

The judgment below dismissing plaintiff's complaint should be affirmed.

Respectfully submitted,

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